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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JOHN GORMAN, an individual;

Plaintiff;

v.

WOLPOFF & ABRAMSON, L.L.P.;
MBNA AMERICA BANK, N.A., and
DOES 1 through 100, inclusive;

Defendants.

Case No. C-04-4507 JW

SECOND AMENDED COMPLAINT FOR
LIBEL; BREACH OF WRITTEN
CONTRACT; VIOLATION OF CAL.
CIV. CODE § 1785.25;
VIOLATION OF 15 U.S.C. §
1681n; VIOLATION OF 15
U.S.C. § 1681o; VIOLATION OF
FAIR DEBT COLLECTION
PRACTICES ACT

Plaintiff John Gorman ("Gorman") hereby alleges as follows:

1. Plaintiff Gorman is an individual residing in the County of Santa Clara, State of California and is an attorney licensed by the State of California.

2. On information and belief, defendant Wolpoff & Abramson, L.L.P. ("Wolpoff") is a limited liability partnership doing business in the State of California. On further information and belief, Wolpoff's legal practice includes the regular handling of debt collection cases throughout the State of California, including in the County of Santa Clara, State of California.

3. On information and belief, MBNA America Bank, N.A.

1 ("MBNA") is a corporation that issues credit cards on a nationwide
2 basis, including to individuals residing in the County of Santa
3 Clara, State of California.

4 4. Plaintiff is the former holder of an MBNA Visa credit
5 card. Plaintiff's MBNA Visa card was issued in the early 1980's
6 and plaintiff consistently paid charges billed to his MBNA Visa
7 account in a timely manner.

8 5. The true names and capacities, whether individual,
9 corporate, associate or other, of the defendants sued herein as
10 Does 1 through 100, inclusive, are unknown to plaintiff, who sues
11 said defendants by such fictitious names pursuant to Code of Civil
12 Procedure Section 474. When the true names and capacities of such
13 defendants are ascertained, plaintiff shall amend this complaint to
14 insert the same. Plaintiff is informed and believes, and based
15 thereon alleges, that each such fictitiously named defendant herein
16 is responsible for each of the acts and omissions alleged herein.

17 6. On information and belief, at all times mentioned herein,
18 the defendants, and each of them, were acting on their own behalf
19 and as the agents, servants, partners, joint venturers, and
20 employees of each other, and within the scope of their agency,
21 authority and employment.

22 7. In or about January and February 2003, a dispute arose
23 between plaintiff and defendants MBNA and Does 1 through 5 and 50
24 through 75 regarding certain charges posted by MBNA to plaintiff's
25 credit card account. The charges in question were from a company
26 called Four Peaks Entertainment for sale and installation of a
27 satellite dish television system. The items shipped to plaintiff
28 were supposed to be brand new but instead Four Peaks Entertainment

1 shipped used and defective equipment that could not be successfully
2 installed. In addition, in the process of attempting to install
3 the equipment, the person sent by Four Peaks to do the installation
4 work left a penetration in the roof of plaintiff's residence
5 through which water could intrude and created deep gouges in an
6 expensive home entertainment center.

7 8. Under federal law, plaintiff had a right to dispute the
8 credit card charges from Four Peaks. Plaintiff notified defendants
9 MBNA and Does 1 through 5 and 50 through 75 in writing in or about
10 February 2003 that the credit card charges from Four Peaks were
11 disputed and should be removed. Said defendants temporarily
12 removed the disputed charges from plaintiff's account but
13 eventually re-posted the disputed charges, notwithstanding that
14 plaintiff had given notice of a valid basis to dispute the charges.
15 Said defendants thereafter wrongfully refused to remove the
16 disputed charges despite multiple requests from plaintiff. The
17 defendants also proceeded to wrongfully impose multiple late fees
18 and finance charges on plaintiff's account. Plaintiff also
19 disputed such late fees and finance charges but they were not
20 removed.

21 9. MBNA and Does 1 through 5 and 50 through 75 subsequently
22 retained Wolpoff to attempt to collect the alleged debt as a debt
23 collector. MBNA subsequently authorized Wolpoff to initiate an
24 arbitration action against plaintiff in or about May 2004. At no
25 time has plaintiff agreed to arbitrate disputes with MBNA nor was
26 any arbitration demand validly served on plaintiff. At no time did
27 MBNA file a petition to compel plaintiff to participate in
28 arbitration under CCP § 1281.2. Likewise, at no time did any

1 arbitration body comply with the California arbitration disclosure
2 requirements related to MBNA's dispute with plaintiff. To date, no
3 arbitration award has been judicially confirmed in favor of MBNA
4 against plaintiff nor has any judgment ever been obtained by MBNA
5 against plaintiff. The charges imposed by MBNA remain subject to
6 dispute.

7 10. Beginning in or about June and July 2003 and continuing
8 through on or about February 20, 2004, defendants MBNA, Wolpoff,
9 and Does 1-20 placed multiple telephone calls to plaintiff at both
10 his residence and his office in an attempt to collect payment of
11 the disputed charges. On information and belief, the defendants
12 placed at least several hundred telephone calls to plaintiff
13 despite being repeatedly instructed not to call. Such calls were
14 placed at various times of the day, including early mornings and
15 late at night, as well as on weekends. The callers would
16 frequently place multiple repeated calls (one after the other),
17 many of which were "computer generated" calls. If plaintiffs did
18 not answer, the defendants would often make a series of "hang up"
19 calls using an auto-dialer. Plaintiff repeatedly instructed the
20 callers to stop calling and asked that all communications be made
21 only in writing. By way of example (and not of limitation), on
22 August 14, 2004, plaintiff received multiple calls from the
23 defendants during a dinner party and asked that the calls
24 immediately stop and also noted that there had been prior requests
25 that no more calls be made to plaintiff's residence and office, yet
26 the defendants continued to place additional calls and interrupt
27 the August 14, 2003 gathering at plaintiff's house. The defendants
28 said that they would continue to call regardless of plaintiff's

1 requests that the calls cease until the disputed debt was paid.
2 The harassing collection calls placed by Wolpoff and MBNA caused
3 plaintiff to suffer great humiliation, annoyance, mental anguish,
4 disruption of his affairs, and embarrassment. The defendants also
5 placed numerous calls to plaintiff's office during the period from
6 June/July 2003 through February 2004 regarding the alleged debt,
7 despite being told by plaintiff and his office staff that such debt
8 collection calls were prohibited by the employer, that no further
9 calls should be placed, and that any communications should be made
10 solely in writing.

11 11. Defendants MBNA and Does 1 through 5 and 50 through 75
12 have falsely reported to Eperian, Trans Union, and Equifax (and
13 possibly other credit reporting bureaus) that plaintiff is
14 delinquent on obligations allegedly owed to MBNA. Such defendants
15 have further willfully and consistently failed to note that the
16 alleged debt is disputed by plaintiff.

17 12. Plaintiff discovered that defendants MBNA and Does 1
18 through 5 and 50 through 75 were providing inaccurate and
19 incomplete information about him in or about late April 2004, when
20 plaintiff received and reviewed credit reports from all three of
21 the major credit reporting bureaus (Equifax, Trans Union, and
22 Experian) that reflected his account as a "charge off" account with
23 a substantial "past due" balance that had been "submitted to
24 collection." The MBNA account was classified as "serious
25 delinquency." The credit reports did not contain any notation that
26 the amount was disputed by plaintiff. Plaintiff thereupon notified
27 Equifax, Trans Union, and Experian in writing on May 6, 2004 that
28 the information provided by MBNA was mistaken and that the alleged

1 delinquency should be promptly corrected. On information and
2 belief, each of the three credit reporting bureaus notified MBNA of
3 plaintiff's dispute and asked that MBNA, as the furnisher of the
4 derogatory information, investigate the dispute. The credit
5 reporting bureaus subsequently notified plaintiff that MBNA would
6 not make any changes or corrections. Once again, MBNA did not
7 inform the credit reporting bureau that the alleged debt was
8 disputed by plaintiff. As a result of MBNA's conduct, plaintiff's
9 credit report has continued to reflect the negative information
10 provided by MBNA. On information and belief, MBNA and Does 1
11 through 5 and 50 through 75 were notified by the various credit
12 reporting agencies of the existence of plaintiff's dispute yet
13 failed to conduct a complete and sufficient investigation. These
14 defendants have further failed to take any corrective action and
15 continue to report the debt as delinquent and without indicating
16 that the charges are disputed by plaintiff, as required by the
17 FCRA. Plaintiff also notified MBNA of the fact that it was falsely
18 and misleadingly reporting the alleged debt as delinquent without
19 indicating that the debt was disputed by plaintiff, including a
20 letter sent to MBNA's legal counsel on September 15, 2004. Once
21 again, no corrective action was taken by the defendants.

22 FIRST CAUSE OF ACTION

23 (Libel)

24 13. Plaintiff repeats and realleges paragraphs 1 through 12.

25 14. The conduct of defendants MBNA and Does 1 through 5 and
26 50 through 75 constitutes libel that tends to defame, disparage,
27 and injure plaintiff in his business and reputation and has also
28 caused pain and suffering. Such libel has occurred on a continuing

1 basis from approximately August 2003 through the present time.

2 15. As a result of defendants' acts and omissions, plaintiff
3 has been injured in an amount yet to be ascertained but believed to
4 exceed the sum of \$210,000.00.

5 16. The conduct of these defendants as alleged herein was
6 willful, fraudulent, malicious, and oppressive. As a result,
7 plaintiff requests an award of punitive damages in the sum of at
8 least \$300,000.00.

9 SECOND CAUSE OF ACTION

10 (Violation of Cal. Civ. Code § 1785.25)

11 17. Plaintiff repeats and realleges paragraphs 1 through 16.
12 [This court has previously found that the second claim does not
13 state a cause of action based upon federal preemption.
14 Consequently, paragraphs 17 through 23 are included for historical
15 purposes only and plaintiff does not expect a response to these
16 paragraphs. However, plaintiff reserves the right to appeal the
17 dismissal of the Cal. Civ. Code claim.]

18 18. Cal. Civ. Code prohibits any person from furnishing
19 information to a credit reporting bureau that such person knows or
20 should know is incomplete or inaccurate.

21 19. Defendants MBNA and Does 1 through 5 and 50 through 75
22 have willfully and intentionally violated Cal. Civ. Code § 1785.25
23 by providing incomplete and inaccurate information concerning
24 plaintiff to various consumer credit reporting agencies.

25 20. Plaintiff is entitled to relief for said defendants'
26 misconduct under Cal. Civ. Code § 1785.31, including actual
27 damages, court costs, loss of wages, attorneys' fees, pain and
28 suffering, punitive damages, and injunctive relief.

1 21. As a direct result of said defendants' breach, plaintiff
2 has been injured in his business and reputation. Plaintiff's
3 damages are not yet ascertained but are believed to exceed the sum
4 of \$200,000.00.

5 22. Plaintiff has also suffered pain and suffering in the
6 amount of \$150,000.00.

7 23. Plaintiff is also entitled to an award of statutory
8 punitive damages in the amount of \$5,000.00 for each violation
9 committed by defendants MBNA and Does 1 through 5 and 50 through
10 75.

11 THIRD CAUSE OF ACTION

12 (Violation of 15 U.S.C. § 1681n)

13 24. Plaintiff repeats and realleges paragraphs 1 through 23.

14 25. Defendants MBNA and Does 1 through 5 and 50 through 75
15 are furnishers of credit information subject to the Fair Credit
16 Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 et seq.

17 26. The FCRA requires that each of these defendants
18 accurately report credit information about consumers to credit
19 reporting agencies, report the existence of any dispute about any
20 allegedly delinquent charges, and promptly verify and correct any
21 contested information provided by them to a credit reporting
22 bureau.

23 27. Said defendants have willfully to comply with the
24 requirements of the FRCA with regard to the furnishing of
25 information about plaintiff in violation of 15 U.S.C. § 1681n. On
26 information and belief, MBNA has consistently reported plaintiff's
27 account as being seriously delinquent without noting that the
28 validity of the debt is disputed. Such false and misleading

1 reporting of the alleged debt has occurred from in or about August
2 2003 through the present time.

3 28. Plaintiff is entitled to recover actual damages of
4 \$1,000, punitive damages, costs of suit, and reasonable attorneys'
5 fees.

6 FOURTH CAUSE OF ACTION

7 (Violation of 15 U.S.C. § 1681o)

8 29. Plaintiff repeats and realleges paragraphs 1 through 23.

9 30. Defendants MBNA and Does 1 through 5 and 50 through 75
10 are furnishers of credit information subject to the Fair Credit
11 Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 et seq.

12 31. The FCRA requires that these defendants accurately report
13 credit information about consumers to credit reporting agencies,
14 report the existence of any dispute about any allegedly delinquent
15 charges, and promptly verify and correct any contested information
16 provided by them to a credit reporting bureau.

17 32. On information and belief, such defendants have
18 negligently failed to comply with the requirements of the FRCA with
19 regard to the furnishing of information about plaintiff in
20 violation of 15 U.S.C. § 1681o. On information and belief, MBNA
21 has consistently reported plaintiff's account as being seriously
22 delinquent without noting that the validity of the debt is
23 disputed. Such false and misleading reporting of the alleged debt
24 has occurred from in or about August 2003 through the present time.

25 33. Plaintiff is entitled to recover actual damages, costs of
26 suit, and reasonable attorneys' fees.

27 FIFTH CAUSE OF ACTION

28 (Violation of Fair Debt Collection Practices Act, 15 U.S.C. §

1 1692(c) and § 1692d Against Wolpoff and Does 20 through 30)

2 34. Plaintiff repeats and realleges paragraphs 1 through 33.

3 35. Each of defendants Wolpoff and Does 20 through 30 has, at
4 all times relevant hereto, acted as a debt collector. Each of
5 these defendants repeatedly and knowingly contacted plaintiff at
6 both his home and office by way of telephone during the period from
7 mid-2003 and continuing through on or about late February 2004 for
8 the purpose of making harassing, threatening, abusive, oppressive,
9 and annoying telephone calls and has otherwise used unfair and
10 deceptive practices to attempt to collect the alleged debt. The
11 calls placed by the defendants were made at various times of day,
12 including but not limited to early mornings and late in the
13 evening, and did annoy and harass plaintiff. These defendants also
14 repeatedly continued to call plaintiff at his office throughout
15 mid-2003 through February 20, 2004 despite being told that such
16 calls were not permissible and that no further calls should be
17 placed. Such debt collection calls continued to be made despite
18 the repeated prior oral and written requests made by plaintiff
19 directing that the defendants communicate with him only in writing
20 and not by telephone.

21 36. Plaintiff is entitled to recover his actual damages, a
22 penalty of up to \$1,000.00, and reasonable attorneys' fees and
23 costs.

24 PRAYER FOR RELIEF

25 Wherefore, plaintiff prays for judgment against the defendants
26 as follows:

- 27 1. Damages according to proof and as authorized by law;
28 2. Punitive damages and statutory penalties;

3. Costs and attorneys' fees as permitted by law;
4. Interest;
5. Injunctive relief; and
6. Such other relief as may be just and proper.

GORMAN & MILLER, P.C.

By _____/s/_____
CRAIG A. HANSEN
Attorneys for Plaintiff